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No. 321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

GENERAL ELECTRIC COMPANY

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY

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BRIEF FOR RESPONDENT GENERAL ELECTRIC COMPANY

STATEMENT OF THE CASE

A. The Facts

Respondent, General Electric Company (referred to herein as "the Company") was granted leave to intervene by the Court of Appeals on October 8, 1959 in opposition to the petition to review and set aside the order of the National Labor Relations Board challenged in these proceedings.

The administrative proceedings at issue here began with a charge filed with the Board by the Company alleging that Petitioner, during a strike against the Company, had violated Section 8(b)(4)(A) of the Act by picketing an entrance to the Company's plant known as Gate 3-A, which was used exclusively for ingress and egress of the employees of independent building construction and maintenance contractors. This entrance was clearly separated from and removed from entrances used by Company employees. Following issuance of a complaint, a hearing was held before a trial examiner who recommended that the complaint be dismissed. The Board adopted the findings of fact of the trial examiner "only to the extent consistent" with its opinion which found that Petitioner had violated the Act as charged (R. 37).

The following facts as found by the Board and the trial examiner are not in dispute:

The complained of action of Petitioner occurred during a strike called by Petitioner at the Company's manufacturing plant at Appliance Park. This plant comprises some 1000 acres (R. 13). It is located about ten miles from downtown Louisville. About 99% of the persons employed there come to work by automobile. The plant employs 10,500 workers, about 7,600 of whom are in a bargaining unit represented by Petitioner (R. 13). During the strike, which lasted from July 27 to August 10, 1958, manufacturing operations continued, the Company advising employees that the plant was open for business (R. 135). More than 2000 of the employees represented by Petitioner did not respect Petitioner's picket lines and worked during the strike (R. 63). The 3000 General Electric employees outside the bargaining unit also regularly

crossed Petitioner's picket lines during this period (R. 18).

Of approximately 5000 employees who came to work, all used entrances to Appliance Park other than Gate 3-A. This gate, the Board found, was one which "the Company's employees were not permitted to, and did not use . . . during all periods material herein" (R. 40, n. 5). The trial examiner made no express finding on this point, assuming it was not necessary to his recommendation (R. 40).

The Board's decision contains a description of Intervenor's plant at Appliance Park, Louisville, the location of the entrance gates, and the sign at Gate 3-A which restricted the use of this gate to employees of independent contractors and directed the use of other gates by employees of the Company, including all the personnel for whom Petitioner acted as bargaining agent (R. 38-40). It also described the methods used by the Company to enforce this restriction through the use of distinctive windshield stickers, identification cards, and instructions to the plant guards under which they were enabled to identify the contractors and their employees and to direct persons approaching this gate, including General Electric employees, who did not fall into this category, to other entrance facilities (R. 40).

Little need be added to this summary of the restricted use of Gate 3-A, except to point out that the record establishes that the guards had been instructed prior to the strike which began on July 28, 1958, not to clear anyone through Gate 3-A unless they had special clearance, without identifying such persons as members of the staff of contracting companies (R. 168-169). During the strike the guards continued to

carry out their assigned duties at the gates, one of their assigned duties being to prevent General Electric employees from using Gate 3-A (R. 166) and the personnel of the contracting firms from using the other gates (R. 110).

Before Gate 3-A was restricted to the use of contractors and their employees there had been several jurisdictional disputes among the various AFL craft locals to which employees of these independent contractors belonged (R. 66). In some of these jurisdictional disputes the craft unions had set up picket lines which had the effect of keeping out not only craftsmen employed by the contractors but some of the Company's employees as well (R. 66-67).

According to the president of Petitioner union the strike, beginning July 27, 1958, was concerned with 24 unsettled grievances that had arisen under the contract between the Company and Petitioner, which is a local of the International Union of Electrical, Radio and Machine Workers, AFL-CIO. Although this contract had nothing to do with the wages and conditions of employment of the contractor personnel, Petitioner placed pickets at all the gates to Appliance Park, including Gate 3-A (R. 133).

When groups of contractor employees approached Gate 3-A on Monday, July 28, the first working day after the strike had been called, the pickets blocked the entrance (R. 79), waved them away, and shouted "go home" (R. 105). Some of the construction men, pointing to the car stickers showing that they were employed by contractors, asked in vain for permission to go through the gate (R. 85, 109). Three employees of another contracting firm arrived in a truck at Gate 3-A and were told they could not go to work (R. 96-

97). Another mechanic, arriving for the late afternoon shift, was confronted by the pickets at the gate and asked them if they were keeping out construction workers. He was referred to the union hall but returned to the gate and asked if any construction workers had gone in. When they told him that none had entered, he also departed (R. 88). Subsequently passes were issued to certain individuals but only for the limited purpose of going through the gate, picking up their tools, and then leaving the premises (R. 82, 97-98).

Possibly because of the past practice of the construction employees in honoring picket lines few, if any, crossed the line.[1] Thus the picketing at Gate 3-A had the effect of forcing all the independent contractors at the Company's plant to cease operations during the strike (R. 63).

That Petitioner knew of and intended that the picket line at Gate 3-A would have the effect of inducing contractor employees to refuse to work at Appliance Park is plainly established in the evidence. One of the contractors whose crew had not crossed the picket line, being disturbed by the possibility of contract cancellation, arranged with the business agent of the union to which his employees belonged for a conference with the striking union (R. 92). The contractor sought permission for his men to enter the grounds. He was told (R. 93-95) by the recording secretary of the striking union that the contractor should "appreciate that we have a picket line up over there" (R.

[1] The Board found (R. 41) that "most, if not all, of the independent contractors' employees refused to cross the picket line and did not work during the strike."

92). On the following day the contractor, accompanied by the business agent for his employees' union, and the Commissioner of Industrial Relations for the State of Kentucky, approached the striking union to discuss the admittance of contractor employees. They were told by Petitioner's vice president on this occasion that he had no authority to extend such workers privileges to enter the grounds, that he would take it up with his executive board (R. 93-94), and get in touch with the contractor's union representative. Nothing resulted from this conference and the contractor's working force did not return until the pickets were removed (R. 94).

B. The Board's Decision

The Board, reversing the Trial Examiner, held that Petitioner had violated Section 8(b)(4)(A) by causing the employees of independent contractors to engage in concerted refusal to work with an object of forcing the independent contractors to cease doing business with the Company. The Board said (R. 42):

> "We find from the foregoing that only the independent contractors' employees were permitted to use gate 3-A, and that the Respondent was aware of this fact. We find also that the Respondent's object in picketing at gate 3-A was to enmesh these employees of the neutral employers in its dispute with the Company. Such purpose is shown not only by the picketing at gate 3-A but also by the oral appeals to the employees of neutrals not to cross the picket line."

Board Member Fanning, concurring specially, held that under the principles established in *Moore Dry-dock*, 92 NLRB 547, relating to picketing of premises

occupied both by a struck employer and a neutral employer, it appeared that the union had violated the Act. He noted that

> ". . . the picketing at Gate 3-A, which was used exclusively by employees of neutral employers, was not reasonably close to the *situs* of the labor dispute with General Electric and that picketing at this gate did not clearly disclose that the dispute was only with General Electric and had not been extended to the neutral employers of the employees using that Gate."

The order of the Board which the Court of Appeals enforced does not prohibit Petitioner from picketing any entrance to the plant used by employees engaged in a primary strike. All that the order does, in almost the precise language of Section 8(b)(4)(A) of the Act itself, is to direct Petitioner to desist from inducing the employees of certain contractors from engaging in a strike or concerted refusal to perform services where an object is to force or require such contractors to cease doing business with the primary employer, General Electric (R. 43, 202).

C. Decision of the Court Below

In the court below Petitioner in addition to attacking the Board's conclusion of law also argued that the evidence did not support the Board's finding that the object of picketing the contractors' gate was to induce a concerted refusal of the employees of neutrals to perform services for the struck employer, on the ground that the picketing at the contractors' gate was a precautionary move in case some of the non-striking employees of General Electric used that entrance, and that in any event the appeal of the pickets

was to individual workers and not to any concerted action,[2]

The Court, however, sustained the findings of fact of the Board. It phrased the question presented to it as follows (R. 198):

> ". . . was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?"

The court having answered this question in the affirmative, held that the Act had been violated, denied the petition for review, and enforced the order.

STATUTES INVOLVED

The National Labor Relations Act, as amended, sometimes referred to herein as the Act, Act of June 23, 1947, c. 120, 61 Stat. 136-162, 29 USC § 151 et seq.; as it appeared prior to its 1959 amendment, contains the following provisions:

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—* * *
> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any

[2] In this Court Petitioner has abandoned these arguments and relies solely on the broad position that since the reserved gate was located on the premises of the struck employer its object in placing pickets there was immaterial.

employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter; * * *

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"Sec. 501. When used in this Act—* * *

"(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

In 1959, the provisions of Section 8(b)(4)(A) were amended by the Labor-Management Reporting and Disclosure Act (Public Law 86-257, 1959, Section 704 (a), 73 Stat. 541, 29 U.S.C. § 158), and now appear as follows:

"Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—* * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process,

transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—* * * .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

SUMMARY OF ARGUMENT

The only question before the Court is whether the Act, as passed in 1947 or as amended in 1959, permits a striking union to induce employees of neutral employers to engage in a concerted refusal to perform services on property owned by the struck employer for the purpose of forcing their own employers to cease doing business with him. According to Petitioner such conduct is permissible when undertaken in furtherance of a primary strike, so long as the efforts of the striking union are confined to discouraging the employees of the neutrals from working behind any picket line thrown around the property of the struck employer (Pet. Br. 11-12).

1. What Petitioner is saying in effect is that even though the question posed by the Court of Appeals as

determinative of the issue[3] must be answered in the affirmative, the "object" test is not controlling so far as a violation of Section 8(b)(4)(A) of the Act is concerned.

Inasmuch as all that the court did was to paraphrase the language of the subsection, such a contention obviously flies in the face of the statute itself. Petitioner argues, however, that other sections of the Act, particularly Sections 2(3), 7, 13, and the proviso to Section 8(b)(4), together with the legislative history, demonstrate that Section 8(b)(4)(A) does not mean what it says.

It is difficult to understand how the cited portions of the statute (Pet. Br. 11) provide any support for Petitioner's broad position. Section 2(3) merely defines the term "employee" and no one has disputed that the contractors' personnel, as well as the General Electric workers, are employees within the meaning of the Act.

The general language relating to the "right . . . to engage in . . . concerted activities for mutual aid" in Section 7, if standing alone, might give some comfort to Petitioner. It is obvious, however, that this broad language is limited not only by Section 8(b)(4) but indeed all the union unfair labor practices (Section 8(b)(1) to (6) inclusive) since each one defines some specific limitation upon the scope of concerted activity.

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[3] As the court put it (R. 198):

". . . was it an object of the strike to induce or encourage the employees of the several contractors—not of the primary employer—to engage in concerted refusal in the course of their employment to perform their own work or to render services so that their employers would cease doing business with General Electric?"

Both the language and legislative history of the proviso to Section 8(b)(4) show that this was not intended to confer immunity upon labor organizations to induce concerted refusals by employees of other companies to cross a picket line of a struck employer. It merely protects an individual employee from legal liability.

Certainly the language of Section 13, which provides in substance that nothing in the Act "except as specifically provided for" shall impede or diminish "in any way" the right to strike, has nothing to do with the issue. The holding of the Board and the court below did not rest on the theory of some implied limitation upon striking or picketing but rather upon the ground that Section 8(b)(4)(A) was a specific impediment provided by the Act itself to instigating certain kinds of strikes or partial strikes. Thus the issue is entirely different from the one considered by this Court in *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, where Section 13 was drawn into conflict with the asserted implications of Section 8(b)(1)(A) and Section 9 (relating only to representation cases).

Petitioner's reliance on legislative history, although more extensively argued, is equally misplaced. Ignoring the fact that the draftsmen of Section 8(b)(4)(A) and Section 303 studiously avoided the use of the term "secondary boycott", Petitioner's brief quotes out of context some remarks of Senator Taft in the course of the debate to show that the Act was intended to prohibit only secondary boycotts and jurisdictional strikes. The brief makes no mention of the fact that Senators Ball and Ellender of the Senate labor committee who were also managing the bill on the floor, used the term "secondary boycott" to describe picket lines placed in front of employer establishments in primary strikes for recognition.

Then on the basis of selective excerpts from Senator Taft's statements, Petitioner leaps to the *non sequitur* that when Senator Taft was speaking of "secondary boycotts" he was referring only to product boycotts occurring on the premises of a "secondary" employer. No mention is made in the brief of the fact that the earlier draft of the bill which was the genesis of Section 8(b)(4) and Section 303, prohibited only product boycotts and hence the addition in committee of the words "to cease doing business with any other person" must have been meant to reach such conduct as Petitioner undertook here.

In short, the whole burden of Petitioner's argument would border on the frivolous were it not for the fact that the Board itself at one period of its history accorded Section 8(b)(4)(A) the strained and unwarranted interpretation Petitioner would have this Court place upon it. In a succession of decisions which Petitioner cites in support of its thesis, *Pure Oil Co.*, 84 NLRB 315; *Interborough News Co.*, 90 NLRB 2135; *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, the Board, disregarding the plain meaning of the statutory language, invented a number of situations to which it declared Section 8(b)(4)(A) did not apply, "traditional primary activity"; "situs picketing"; "roving situs", etc.—terms nowhere used in the Act. The Board even went so far in one of these cases, *Ryan Construction Co.*, 85 NLRB 417, where pickets were also placed at a plant entrance not used by the personnel of the struck employer, as to hold such a deliberate incitement to employees of neutrals was beyond the reach of Section 8(b)(4)(A).

The Board overruled the rationale of the *Ryan* case in *Crystal Palace Market*, 116 NLRB 856, enf'd *sub.*

nom. Retail Fruit & Vegetable Clerks v. *N.L.R.B.*, 249 F.2d 591 (C.A. 9)—a decision that Petitioner attempts to distinguish (Pet. Br. 94-95). In its brief Petitioner contends that the holding in the *Ryan* case was approved by this Court in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, although the facts in the latter case were entirely different. Hence it is said that neither the Board nor the court below correctly applied *Rice Milling* in disposing as they did of the case at bar.

The opinion of this Court in *Rice Milling*, however, did not turn on any broad notion of "primary situs picketing" but upon the fact that since the offending conduct of the striking union was the turning away of a single truck driver by a picket line situated at the entrance to the plant also frequented by the employees of the struck employer, there was no proof of inducement of a "concerted" refusal. In its somewhat lengthy opinion the Court did cite *Ryan Construction* in a footnote but only in support of a noncontroversial dictum.

Petitioner insists that *Rice Milling* cannot be read as holding or implying that the union's conduct there was "permissible only because it was not concerted" (Pet. Br. 15). But the legislative history of the Landrum-Griffin Act shows that both the proponents and opponents of the 1959 amendments to Section 8(b)(4)(a) which eliminated the word "concerted" understood that this was the very ground upon which the *Rice Milling* holding was rested.

We do not contend that a union which places pickets in front of a plant as the source of a primary strike for the purpose of persuading or shaming the nonstriking employees of the struck employer from enter-

ing, violates Section 8(b)(4)(A) *per se* merely because employees of other companies approaching the plant in the course of their normal duties are deterred from crossing the picket line. Such incidents may be so unavoidable and so entangled with the legitimate activities of the pickets that the Board and the courts are justified in finding that evidence of the proscribed objective is lacking and that an inference of intent to enmesh the personnel of neutrals cannot be inferred from the presence of a picket line at the entrances for plant employees. But where it is clear from the location of the pickets or from the character of the inducements to employees of the neutrals that the real object of the union is to reach them and not merely to disrupt the primary employer-employee relationship existing in the company with whom it has a dispute (as Petitioner concedes was its object here), the Board, far from "usurping the function of Congress," is simply carrying out its statutory duty when it holds that such conduct is expressly forbidden by the Act.

Thus there is no sound legal basis for Petitioner's objection to what it terms the "new approach" of the Board. It is true that decisions of the courts of appeals in some circuits lend color to Petitioner's argument, including *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585, and *Di Giorgio Fruit Corp.* v. *N.L.R.B.*, 191 F.2d 642, both of which arose in the District of Columbia circuit, which court also passed upon this case.

In these cases, however, and in similar cases in other circuits, the courts, either misled by the fragmentary legislative data which caused the Board to arrive at its *Pure Oil* and *Ryan* decisions, or erroneously interpreting this Court's holding in *Rice Milling* as an

affirmance of such doctrines, failed to perceive that the crucial question in each case was the object of the picketing union. In this case, where the evidence on that point was pinpointed, the very circuit which had originally given the widest latitude to primary situs immunity applied the proper test.

2. There remains the question of whether the 1959 amendments to Section 8(b)(4) detract from the old Act in any relevant respect.[4] Both Petitioner and the amici, despite the omission of the word "concerted," attach importance to the proviso exempting from the proscriptions of the subsection "where not otherwise unlawful, any primary strike or primary picketing." Obviously the qualifying phrase leaves the situation as it was before and the term "primary picketing," not being defined in the statute, merely begs the question. Nothing in the text of the new Act sheds any light as to whether the term "primary picketing" refers, as Petitioner urges, to any picket line situated in the vicinity of property where a primary strike is in progress, or whether the term refers only to picketing directed at the employees of the primary employer.

This question, however, is answered by the authoritative report of the House Conference Managers, for this particular proviso was written in conference and did not appear in either the House or the Senate bills.

The conference report stated that the proviso's purpose was to make clear that

> "the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picket-

[4] As the Board order operates prospectively, it is necessary to consider whether the revised language of the applicable subsection created an immunity which would apply to Petitioner's conduct if repeated again today.

> ing at the site of a primary dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U.S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc.*, and *Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953))."

If the *Moore Drydock* case cited, as Petitioner contends, is not the decision appearing in 81 NLRB but rather the case concerning the same company reported in 92 NLRB 547, it would appear that the conferees by endorsing the restrictive principles set forth in that opinion, viz., that the picketing had to be as close as possible to the situs of the dispute, were in effect declaring that existing law prohibited the activity to which Petitioner resorted (see concurring opinion of Member Fanning). The conferees, therefore, apparently deemed the term "primary picketing" to refer to activity at least ostensibly intended to appeal to the personnel of the struck employer. Petitioner's picketing of the reserved gate accordingly does not come within the Congressional concept of "primary picketing," for as it candidly states—

> "The Petitioner has at all times freely admitted that its object in picketing at Gate 3-A was to appeal to employees of the contractors not to serve General Electric, the primary employer, behind the picket line. It has never maintained that its inducement of the contractors' employees by picketing there was merely an unavoidable consequence of picketing directed at and designed to reach GE's employees." (Br. 21)

Moreover, the Board's decision in *Crystal Palace*, overruling the *Ryan* case, was made in 1956 and the Board decision in this case issued more than two months before the conference. Consequently, the inference is inescapable that the conferees regarded these opinions as part of the body of "existing law" the proviso was intended to preserve.

ARGUMENT

I. WHEN A UNION INDUCES EMPLOYEES OF INDEPENDENT CONTRACTORS WHOSE WAGES AND CONDITIONS OF EMPLOYMENT ARE NOT IN DISPUTE TO ENGAGE IN A CONCERTED REFUSAL TO PERFORM SERVICES FOR THE ADMITTED OBJECT OF CAUSING THEIR EMPLOYERS TO CEASE DOING BUSINESS WITH ANOTHER COMPANY, IT IS VIOLATING SECTION 8(b)(4)(A) OF THE ACT, IRRESPECTIVE OF WHETHER IT IS ENGAGED IN A PRIMARY STRIKE AGAINST SUCH COMPANY

The finding of violation of Section 8(b)(4)(A) in this case was not based upon Petitioner's conduct in calling a strike of the General Electric employees it represented or in placing pickets around its plant with a view to persuading the striking employees not to enter. It was based entirely upon the fact that Petitioner not content with placing the pickets at such entrances, also stationed pickets at a gate reserved exclusively for employees and suppliers of some six construction contractors whose employees were engaged in construction and repair work on buildings owned by the struck employer in the general plant enclosure, thereby causing them to engage in a concerted refusal to enter and perform their ordinary services.

Petitioner, as we have seen, candidly admits that its activities at this gate were intended to bring about this result for the deliberate object of forcing the contractors to cease doing any business with the struck employer—at least for the period of the strike. This being the factual situation, the conduct of Petitioner

would seem to be clearly proscribed if the applicable subsection is read literally. *Seafarers International Union* v. *N.L.R.B.*, 265 F.2d 585 at 591. It is Petitioner's contention, however, that certain other provisions of the Act, as well as the legislative history, prove that its activities were not forbidden by the subsection.

Petitioner takes the broad position that when a union is engaged in a lawful primary strike it may by picketing, or by oral or written communication elsewhere (Br. 36), undertake to induce not only the employees of the struck employer but even personnel employed by individual contractors, customers or suppliers to keep away from the premises of the struck employer. Its point is that such conduct amounts to nothing more than "traditional primary activity" to which Section 8(b)(4)(A) was not intended to apply.[5]

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[5] Petitioner's contention that the proscriptions of Section 8(b)(4)(A) are not meant to be taken literally is at odds with unions' reliance upon a literal reading of the section when such an approach suits their purpose. Thus, they have argued that particular inducements, though secondary in character, are legal because the induced employees are not "employees" within the meaning of the section or that the inducement is not directed toward an "employer" or "person" as defined, e.g., supervisory employees, *Rabouin d/b/a Conway's Express* v. *N.L.R.B.*, 195 F.2d 906 (CA 2); railroads, *International Rice Milling Company* v. *N.L.R.B.*, 183 F.2d 21 (CA 5); *Local* 25, *International Brotherhood of Teamsters* v. *New York, N.H. & H.R.R.*, 350 U.S. 155; county, *N.L.R.B.* v. *Local* 313, *International Brotherhood of Electrical Workers*, 254 F.2d 221 (CA 3). It is interesting to note that had the primary situs doctrine been given the currency now attributed to it by Petitioner, it would have been unnecessary to rely on the purported statutory exclusions, for the conduct complained of would have presumably been protected by its occurrence at a primary situs even if directed at a railroad or municipality.

A. The Language of the Act Creates No Exemption

The provisions of the Act cited by Petitioner as pointing to such a limited construction of Section 8 (b)(4)(A) are Section 2(3), Section 7, Section 13, and the proviso to Section 8(b)(4). Obviously Section 2(3), which merely defines the term "employee," has no relevance and Section 7, relating to the right to engage in concerted activity when read in the context of the whole statute, must mean concerted activity not defined as an unfair labor practice by labor organizations under Sections 8(b)(1)(A) to 8(b)(6), inclusive.

Section 13 and the proviso to Section 8(b)(4) have been adverted to by the Board and the courts in decisions relating to 8(b)(4)(A), however.

1. The right to picket is no broader than the right to strike.

Petitioner's reference to Section 13 would indicate that it places considerable reliance on this section for its basic position. That section reads as follows:

> "Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

At first blush this section would not seem to advance Petitioner's position, for plainly Section 8(b)(4), the basis of the complaint here, is one of the impediments to striking specifically provided for in the Act itself. Therefore, it is somewhat circular reasoning to invoke this section with respect to any of the provisions of Section 8(b)(4), for its language throws the determination of any case back to the preceding specific provisions. The present case is quite unlike *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639,*

362 U.S. 274, where the Board's attempt to stop picketing by a minority union was predicated entirely upon Section 8(b)(1)(A). The language of that sub-section, unlike Section 8(b)(4)(A), does not explicitly refer to strikes or partial strikes and therefore had to be evaluated with other sections of the Act. As the Court correctly stated (id., 362 U.S. at 282):

> "Section 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike."

The real importance of the subsection, so far as Petitioner's argument is concerned, seems to be what this Court said in a footnote to the foregoing decision: ". . . picketing has been equated with striking for the purposes of Section 13" (id., 362 U.S. 281, n. 9).

With this proposition we have no quarrel, although the Court itself says nothing about the right to picket. The term "strike" used in Section 8(b)(4) and Section 13 of Title I of the Labor-Management Relations Act is defined in Section 501(2) as including "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective agreement) and any concerted slow-down or other concerted interruption of operations by employees." Granted that Section 13 guarantees the right to picket as well as the right to strike, there is certainly nothing in this Court's treatment of Section 13 which would imply that the Act's *limitations* on striking have no application to picketing.

The very premise of Petitioner's position depends on a contrary assumption. In the *Drivers, Chauffeurs* case the Court quoted with approval the comments of Senator Taft on the effect of one of the proposed

amendments to the Labor Relations Act, 362 U.S. 287-288:

> "It seems to me very clear that so long as a union organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it.
>
> "The Board may say, 'You can persuade them; *you can put up signs;* you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work.' As I see it, that is the effect of the amendment." (Emphasis supplied.)

The Court treated these remarks as reinforcing its conclusion that picketing even when employed for organizing purposes was not coercive. In other words, the Court recognized that picketing was as legitimate a means of communication as speech or writing. It did not say that it stands on any better footing.

When Congress in Section 8(b)(4) directed labor organizations to refrain from inducements and encouragements to strikes or partial strikes for specified objects, it obviously must have meant to prohibit the effectuation of such inducements or encouragements by any method of communication, including picketing. Petitioner may be correct in deriving from the right to strike protected by Section 13 the right to picket which it asserts in this case. The logic of its position would suggest that the two rights are co-extensive. The fallacy of Petitioner's argument is that it recognizes no such limitation on the scope of picketing.

Petitioner, of course, does not contend that merely by calling a strike at a factory it could then appeal by

letter or telephone to building trades or transportation unions not to work on the premises for independent employers who have business there, for that clearly would be an "inducement" under Section 8(b)(4)(A). It does claim this right if a picket line is on the premises, however. But if the pickets are there (as were the pickets at Gate 3-A) not for the purpose of "inducing employees of the primary employer to strike, and prospective replacements to refrain from taking the place of the strikers" (Pet. Br. 30), but simply to induce action by neutral workers, the presence of the pickets would be immaterial. Obviously such picketing is just a means of communicating. The forbidden signal so far as privilege is concerned, is no different from an oral or written message. Even the stoutest apologist for peaceful picketing has never urged that it enjoys a preferred position to free speech.

Conversely, to the extent that a strike is lawful, the Act is indifferent to the means of communication used by the striking union to induce, without coercion, the primary employees to join and continue the strike. The inducement may be accomplished by telephone, leaflet, or by picket signs. Thus the place where the picket signs are carried is immaterial so long as it can be fairly inferred that the object of the pickets is to reach the primary employees (or even the general public). *Local 618, Automotive, Petroleum, and Allied Industries Employees* v. *N.L.R.B.*, 249 F.2d 332 at 337 (C.A. 8) The traditional object of picketing a place where a struck employer is operating his business is, as Chief Judge Woodbury of the Court of Appeals for the First Circuit expressed it, the exertion of individual pressure on a non-striker "by embarrassing him into either joining the strike or quitting his job." *N.L.R.B.* v. *United Steelworkers*, 250 F.2d 184, 187.

2. Section 8(b)(4) proscribes inducement of a partial as well as a total refusal to perform services.

For some reason not altogether clear Petitioner stresses that its agents made no effort to deter employees of the various contractors from working on projects for other customers outside the struck plant. It is true that the record does show that employees of two of the contracting firms who ordinarily worked inside the General Electric grounds, were dispatched by their employers, after they had refused to cross the picket line, to other construction jobs.

Obviously this aspect of the matter does not constitute a legal defense to Petitioner's conduct unless there is some merit to the suggestion that because the construction workers were willing to perform some services, they had not been induced to engage in "a concerted refusal . . . to perform *any* services." Clearly this is an absurd reading of the statute for the term "refusal" is qualified by the word "where an object thereof is to force or require such employer. . . . to cease doing business with. . . ." Hence a refusal to perform *any* services for the purpose of forcing the contracting firms to cease doing business with General Electric, when instigated by Petitioner, was plainly contrary to the Act. The fact that it had no objection to the employees performing services unrelated to this illegal purpose is immaterial.

In another portion of its brief Petitioner concedes the frivolity of its argument on this point by recognizing that subsection 8(b)(4)(A) proscribed not only efforts to induce strikes, but also efforts to induce partial strikes (Br. 22).

3. The proviso to Section 8(b)(4) provides no defense for Petitioner's conduct.

The concluding proviso to Section 8(b)(4) is also referred to by Petitioner for the proposition that a striking union is free to induce employees of neutral employers to refuse to perform services "upon the premises of a struck employer" (Pet. Br. 38). Despite the citations to reported decisions, however, the Board has never so held. An examination of *N.L.R.B.* v. *Rockaway News Co.*, 345 U.S. 71, also reveals that this Court made no such holding

The very language of the proviso[6] shows that it created no exemption for labor organizations but simply for individual employees. A labor organization can scarcely be said to have an employer upon whose premises it could enter. Thus there is no basis for the contention made by Petitioner and the *amici* that under principles of free speech, labor organizations could induce individuals in concert to refuse to enter struck premises.

A more careful study of the legislative history of the Act than either brief contains would reveal the historic basis of this proviso which was included in S. 1126, the Senate version of the Taft-Hartley Act as

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[6] The proviso reads as follows:

> "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

reported from committee.[7] Originally the major provisions of Section 8(b)(4) and Section 303 were contained in Section 204 of a different bill, S. 55,[8] which in turn was a revision of the Case bill passed in the 79th Congress but vetoed by the President.

In S. 55 the prohibitions were not stated in terms of unfair labor practices by labor organizations but applied generally to any person engaging in such conduct. In this framework the proviso was necessary to relieve an individual employee from liability for treble damages under the antitrust laws. When this portion of S. 55 was revised and incorporated by the Senate committee into the amended Labor Relations Act, it was thought that its retention was desirable in order to clarify the distinction between individual and concerted conduct.

B. The Legislative History of the Act Discloses No Intent to Authorize Striking Unions to Instigate Concerted Stoppages by Employees of Neutral Companies.

1. Resort to legislative history is justified only where statutory language is ambiguous or would produce an absurd result. This is not the case here.

As previously noted the wording of Section 8(b)(4)(A) would obviously apply to the activity of Petitioner at the reserved gate. To avoid the plain meaning of the subsection, however, Petitioner's brief contains extensive citations to the Senate debates which, when analyzed, simply prove that the sponsors of the Act did not intend to proscribe strikes to obtain higher

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[7] Legis. Hist. 99 at 114. "Legis. Hist." refers to the two volume work, "Legislative History of the Labor Management Relations Act, 1947" (G.P.O. 1948).

[8] The text of the corresponding section in S. 55 is printed in the Appendix of this brief.

wages or better conditions of employment. As this fact is self-evident from the language of the Act, particularly the language of Section 8(d), it is difficult to see why it was necessary to resort to the Congressional record.

The courts have held that it is necessary to examine legislative history only where statutory language is ambiguous or to avoid some clearly absurd and unintended result, e.g., *Holy Trinity Church*, 143 U.S. 457. Apparently as an excuse for departing from this well settled canon of construction, Petitioner quotes with approval a comment of Judge Rifkin in *Douds* v. *Metropolitan Federation of Architects*, 75 F.Supp. 672, 675 (S.D.N.Y.), and a similar comment by Judge Learned Hand in *Douds* v. *International Longshoremen's Association*, 224 F.2d 455, 459. Petitioner attributes to these judges the view that if Section 8(b)(4)(A) were taken literally, all strikes would be prohibited, irrespective of their primary character, since the result of any strike, if effective, would bring about a cessation of business between the struck employer and other persons (Pet. Br. 40). With all deference to these distinguished jurists, this point is not well taken.

From this rationale Petitioner reasons that "in this respect there is no distinction between a primary strike and a secondary strike" (Pet. Br. 40). There is a fundamental difference, however. The usual object of a primary strike is to obtain some economic advantage. The shut-down of operations and the ensuing disruption of business relationships are only a means to that end, whereas the object of inducing a stoppage of neutral operations is attained as soon as such employer ceases to do business with a company with whom the union has a dispute.

2. The contention that the Act was intended to prevent only what Petitioner characterizes as "secondary boycotts" is based on a distorted treatment of Congressional debates.

In any event, the legislative history, as a whole, discloses that Congress meant to outlaw all activities involving strike action against neutral employers. Petitioner's contention to the contrary is based on some general remarks of Senator Taft in the course of the debates which Petitioner cites as showing that Congress was aiming only at those strikes and inducements to strike which were familiar to it as "secondary boycotts."

(a) The Understanding of the Term By Congress.

One of the faults of Petitioner's argument is that from its own standpoint it proves too much. There is no doubt that Senator Taft and other managers of the bill, including his colleagues on the committee, Senators Ball and Ellender, did repeatedly use the term "secondary boycotts" to describe the intent of Section 8(b)(4), although the term itself is not used in the Act.

The official record of the debates reveals a general understanding that Section 8(b)(4) had a much broader scope than what most writers on industrial relations would describe as a secondary boycott. Many Senators used the term as if it were synonymous with picketing in a primary recognition strike. Thus Senator Ball, in urging the adoption of what is now Section 8(b)(1)(A), said:

> ". . . I have a story appearing in the New York Journal American of March 14, telling about how the employees of fuel concerns in Westchester County were being forced to join, against their wishes, a union as the price of keeping their job. In that case a picket line was thrown around the

plant after the employees refused to join a union. *It was a typical secondary boycott which is covered in another section of the bill.* Of interest is the comment of the owner of the business. He says that his employees, against their will, paid an initiation fee of $37.50 and joined the union." (Emphasis supplied.) 93 Daily Cong. Rec. 4138, April 25, 1947; 2 Legis. Hist. 1020-21.

Presumably the reference to "another section" was to Section 8(b)(4). On another occasion Senator Ellender referred to secondary boycotts the same way:

> "A secondary boycott, as all of us know, is a concerted attempt on the part of a strong union to compel employees to deal with them, even though the employees desire to be represented by other unions, or not to be represented at all." 93 Cong. Rec. 4255, April 28, 1947; 2 Legis. Hist. 1056.

Even the excerpt from the "Supplemental Views" of Senators Taft, Ball, Donnell, and Jenner, contained in the official Senate committee report on the bill, employs the term "secondary boycott" in reference to what Petitioner and the Board would undoubtedly regard as primary picketing:

> "There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the small employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of racketeering union activity. To a small storekeeper, or machine shop, *picketed out of business by unions intervening between him and his employees*, or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed . . ." (Em-

phasis supplied.) Senate Report No. 105 on S. 1126, Sup. Views, p. 54; 1 Legis. Hist. 460.

There is no reason to think that in the excerpts from Senator Taft's statements which appear in Petitioner's brief, containing disclaimers that the bill had any broader purpose than to outlaw "secondary boycotts" and "jurisdictional strikes," he was using the term "secondary boycott" in any more restricted sense. In fact he stated that the committee had never heard anyone "tell us any difference between different kinds of secondary boycotts", 93 Cong. Rec. 4323, April 29, 1947; 2 Legis. Hist. 1106. In reply to Senator Pepper, an opponent of the bill who had asserted that Section 8(b)(4) "is not limited to the secondary boycott. It is applicable as well to the primary boycott" (93 Cong. Rec. 4322, April 29, 1947; 2 Legis. Hist. 1105), Senator Taft admitted as much. He said:

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or *with whom it is having trouble or having a strike.* On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that." (Emphasis supplied) 93 Cong. Rec. 4323, April 29, 1947; 2 Legis. Hist. 1107.

It is also not without significance that whenever Senator Taft referred to the kind of strikes the proposed legislation would permit he always referred to disputes

involving the wages, hours and working conditions of the immediate strikers. At no point did he ever use the word "primary" to characterize this type of concerted activity.

(b) The Revision of Section 8(b)(4) in Committee

The foregoing illustrations from the legislative debates reveal that Petitioner has given a somewhat distorted picture of what the Congress actually understood Section 8(b)(4)(A) to mean. Far from demonstrating that Congress was merely outlawing product boycotts or picketing at the premises of a secondary employer, the remarks of both the proponents and opponents of this subsection show a recognition that not only the type of activity in question here was intended to be barred, but also certain kinds of "primary" action.

Moreover Petitioner's view that only product boycotts were intended to fall within the proscriptions of the subsection fails to take into account the evolution of its wording in the Senate committee. As the text of the corresponding section in S. 55 shows (Appendix A), the words "to cease doing business with any other person" were not included in that bill prior to its incorporation (and subsequent revision) into the text of the committee.

Obviously there would have been no occasion for adding these words to the list of proscribed objects, if the Senate committee had wished to confine the scope of the bill to product boycotts, for the language of S. 55 was adequate enough on this point. The very situation which the additional words were meant to encompass, for it had been brought to the attention of the committee in public hearings, was the practice of

striking unions (particularly in unpopular strikes) to bring additional pressure to bear by inducing union members employed by other companies to deny any services to the struck employer. Unless these words cover such conduct as Petitioner engaged in, the supplementary language added little or nothing to the original text.

3. The earlier Board approach cannot be regarded as sound precedent as it also reflects a highly inaccurate assumption of Congressional purpose.

(a) A Fragmentary Reading of Legislative History Caused the Board To Err In Its Earlier Interpretation of the Section.

Although it is urged that certain early decisions of the Board, notably *Pure Oil Co.*, 84 NLRB 315, *Ryan Construction Co.*, 85 NLRB 417, and *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, correctly construed Section 8(b)(4)(A), and should not be overruled or limited as the Board has done in such recent cases as this, it is apparent that the rationale of those cases was the product of the same erroneous notion of legislative history to which Petitioner has resorted. The *Pure Oil* case which set the pattern is almost a classic example of how not to construe a statute.

This was a case concerning a loading dock shared by the Standard Oil Company with Pure Oil. The workers of both companies were represented by the same union but in separate bargaining units. A strike was called against Standard and the union picketed the dock. The Pure Oil employees at the direction of the union then refused to enter or to operate the picketed facilities, even though there was no dispute between the union and the latter company. Plainly the object was to force Pure Oil to cease doing business with Standard at the pier. The Board, however,

dismissed the complaint that had issued under Section 8(b)(4)(A).

In so doing, it abstained from any security of the wording of this subsection and without quoting it, declared:

> "It is clear from the legislative history that it was aimed at secondary and not primary action." 84 NLRB 315 at 318.

The Board then engaged in a most fragmentary study of the legislative history. It took from context Senator Taft's explanation that "all this provision of the bill does is to revise the effect of the law as to secondary boycotts," id., 84 NLRB 318. It completely ignored, however, language used by Senator Taft, as well as Senators Ball and Ellender, which showed that they were not thinking of secondary boycotts in the classic or even familiar sense of the term. Nor did the Board make any mention of the expanded revisions to S. 55 which had occurred in the Senate Committee.

The Board in quoting Senator Taft to the effect that "primary strikes over terms and conditions of employment are 'entirely proper' and 'throughout this bill are recognized as proper strikes'," 84 NLRB at 318, thereby implied that Senator Taft, who had never used the word "primary" had laid the groundwork for the Board's notion of the distinction between "primary" and "secondary" activity. From this dubious outline of the explanation of the bill's principal sponsor, the Board concluded "from the available legislative history" that Section 8(b)(4)(A) "does not outlaw any of the primary means which unions traditionally use to press their demands on employers."

Actually, the theory that Congress had meant to preserve the "primary means which unions traditionally use to press their demands on employers" was a figment of the Board's imagination, as the colloquy between Senators Taft and Pepper, previously quoted, reveals. Shortly thereafter the "primary action" theory was extended to cover what the Board called "primary situs picketing."

In a case which came before it, *Ryan Construction Co.*, 85 NLRB 417, later that year, the Board, relying on nothing except its own views of legislative history, held in a situation very much like the one with which the Court is confronted in this case that the gate of a struck factory providing access to the plant only for construction company employees was "primary picketing" and that "Section 8(b)(4)(A) was not intended by Congress, *as the legislative history makes abundantly clear,* to curb primary picketing" (Emphasis supplied).

In another year the Board was to hold that picketing of a truck at the premises of customers of the struck employer was also "primary", as the truck was a "roving situs". Manifestly any real attempt to appraise the Congressional history would have made it clear that such an interpretation of the statute was without warrant.

It is apparent from the sweep of these opinions that the Board by ignoring the language of the statute and resorting to imagination really conferred immunity upon some of the very abuses Congress sought to correct. This result could have been avoided by emphasizing that the legality of a picket line does not depend upon its location, but upon its object. Under this simple test unions would still be able to post picket

lines around employee entrances in primary strikes, even though their incidental effect might be to discourage employees of some other companies from entering, provided the pickets took no steps to bring about concerted action of this sort.

This Court itself has said that the situs of the picketing is not controlling, *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, and has found violations of Section 8(b)(4)(A) in situations where the picketing was conducted at the places where employees of the struck employer would normally report for work, *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675. It is submitted that the new approach of the Board which distinguishes between what is "unavoidable and incidental" and what is deliberate, so far as any impact on neutrals occurs, more closely conforms to the intent of Section 8(b)(4)(A) than the obscure and conflicting tests adverted to by the Board in the opinions commended by Petitioner.

(b) Contrary to the Board's Earlier Premise, a Strike Which Commands Rank and File Support Need Not Involve Neutrals In Order To Be Effective.

Implicit in some of the early Board cases which pushed to extremes the doctrine of primary situs immunity was the notion that unless strikers could shut off service from a struck employer by preventing personnel from other companies from entering the plant enclosure, the strike could not be effective. Petitioner in this case expressly urges this view upon the Court as a ground for supporting its strained interpretation of the Act.

Such an argument ignores the problems of industrial life. An experienced working force is an indispensa-

ble asset to any manufacturer engaged in the advanced technology of making electrical products. If all or a substantial part of such working force exercises its right to stop working until certain conditions are met, production would be severely crippled irrespective of whether services from truckers or construction contractors were still available. A trained working force cannot be readily replaced. Indeed, regulations of the Department of Labor prevent public employment offices from referring applicants for work to a struck plant. Moreover, very few workers, even if unemployed, can be induced to take the place of strikers because the prospect of being called a scab or a strike breaker, or inviting physical violence on the part of angry pickets is not an alluring one.

It is only where the great bulk of the workers do not feel that it is to their own interest to go out on strike that the strike leaders need a boycott by third parties in order to bring effective pressure upon an employer. It is obviously this kind of tactics that Section 8(b)(4)(A) was intended to prevent.

4. By disregarding the theory of primary situs advanced by the Board in Rice Milling, this Court rejected the proposition urged here by Petitioner.

(a) Contrary to Petitioner's Contention, the Rice Milling Decision Rested Solely On the Absence of Appeal to Concerted Activity.

Notwithstanding the language of this Court in *N.L.R.B.* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, Petitioner urges *Rice Milling* as support for its thesis that any picketing at a primary situs is immune. Petitioner argues (Br. 66)

> "Upon this finding that the conduct of the pickets was primary rather than secondary the Court deemed it unnecessary to 'determine the specific objects toward which a union's encouragement of

> concerted activities must be directed in order to amount to an unfair labor practice.' "

The fact that no such finding is contained in the opinion is indicative of the liberties Petitioner has taken with this decision. Indeed, nowhere in the opinion is mention made of primary or secondary activity. Moreover Petitioner has glossed over what was apparently a tacit repudiation of the primary situs immunity theory.

Rice Milling in this Court dealt solely with the inducement by union pickets stationed at the entrance of a struck plant of two occupants of a truck, the driver and his helper, to refrain from making a pick-up at the struck plant. That this was the only matter before the Court is manifested by the Court's statement at the outset of its opinion that "this review is confined to the single incident described in the complaint," 341 U.S. at 668. Describing the arguments of the charging party, the Court dismissed these contentions in the following language, 341 U.S. at 670:

> "A sufficient answer to this claimed violation of the section [8(b)(4)(A)] is that the union's picketing and its encouragement of the men on the truck did not amount to such an inducement or encouragement to 'concerted' activity as the section proscribed."

Although the precision of this language can leave no doubt that the Petitioner's reliance upon the decision is ill-advised, the full import of this Court's holding is made clear only by an analysis of the decision in the context of the holdings below. For had the Court wished to approve the Board's sweeping concept of primary activity in that case, it had only to adopt the situs theory pressed upon it by the Board, which was

the crucial issue before both the Board and Court below.

The Board in that case[9] specifically rejected the trial examiner's finding that the picketing activities attending the strike at the Kaplan Mill constituted a violation of Section 8(b)(4)(A), and rested its decision squarely on its notion of the protected nature of such activity at a primary situs. It stated:

> "The Trial Examiner also found that the Respondent violated Section 8(b)(4)(A) and (B) by attempting to prevent a Sales House truck from entering the Kaplan mill on Otober 21, 1947. We do not agree with this finding. The Respondent's activities arose out of the *primary* picketing of the Kaplan mill, and were carried out in the immediate vicinity of that mill. Violence of the picket line is not to be condoned, but violence does not convert *primary* picketing into *secondary* action within the meaning of Section 8(b)(4)(A) or (B)." [Original Emphasis]

Upon petition for review in the Court of Appeals for the Fifth Circuit,[10] the Court reversed the Board, predicating its decision upon the view that the Act nowhere differentiated between primary and secondary activities, and therefore the union's picketing violated the express proscriptions of the statute. The Court said:

> "We do not agree with the Board's holding that the union's activities in refusing to allow a truck owned and operated by grain warehousemen were

[9] *International Brotherhood of Teamsters, Local* 201 (*International Rice Milling Company, Inc.*), 84 NLRB 360.

[10] *International Rice Milling Company, Inc.* v. *N.L.R.B.*, 183 F.2d 21 (CA 5).

not violative of Section 8(b)(4)(A) and (B) of the Act. The Board assigns as the reason for its holding, the fact that the union's activities arose out of primary picketing, and that, since they were carried out in the immediate vicinity of the mill, they were not violative of the Act. The Board attempts to draw a fine distinction between primary and secondary action. . . .

"The statute clearly provides a remedy for the type of conduct engaged in by the union, without resort to any distinction between primary and secondary activities. . . ."

Although both the Board and the Court of Appeals saw the issue solely in terms of the locus of the picketing, this Court carefully framed its opinion in terms of an issue not alluded to in either forum. Focusing solely upon the "single incident" of inducement of the driver (with his helper) of a lone truck, this Court went on to say, 341 U.S. at 671:

"A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business generally are not aimed at concerted, as distinguished from individual, conduct by such employees. Generally, therefore, such actions do not come within the proscriptions of Sec. 8(b)(4), and they do not here."

Finally, again reflecting the specific limited grounds of its holding in *Rice Milling*, the Court, in *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 687-688 (another case decided the same day), summarized its *Rice Milling* decision as follows:

"There the accused union sought merely to obtain its own recognition by the operator of a mill, and the union's pickets near the mill sought to influence two employees of a customer of the mill not

to cross the picket line. In that case we supported the Board in its conclusion that such conduct was no more than was traditional and permissible in a primary strike. *The union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill.*" [Emphasis supplied.]

The precise and deliberate holding of the *Rice Milling* case, particularly in the context of its departure from the specific grounds of decision offered by the Board and the Court below, leaves no doubt whatsoever that this Court did not accept the view that there was an implied limitation on Section 8(b)(4)(A). Beyond that, however, the choice of a ground other than that primarily urged by the respective parties in their briefs (see 95 L.Ed. 1279) suggests this Court's reluctance to adopt the sweeping situs doctrine enunciated by the Board.

(b) Petitioner's Interpretation of Rice Milling Is Contrary to Congressional Understanding.

Petitioner insists (Br. 15, 71-72) that notwithstanding the explicit grounds upon which Mr. Justice Burton's opinion in the *Rice Milling* case rested, the Court of Appeals for the Sixth Circuit "clearly erred" in stating that the ruling "was based on the fact that the union sought concerted conduct on the part of the employees of the other employer," *United Brick & Clay Workers* v. *Deena Artware*, 198 F.2d 637 at 643, *certiorari denied*, 344 U.S. 897.

Petitioner's view, however, is not only at odds with the Sixth Circuit but is also in conflict with the understanding manifested by both proponents and opponents of the Landrum-Griffin substitute in the recent debates

preceding the passage of the Labor-Management Reporting and Disclosure Act. Thus Representative Griffin, a co-sponsor of the measure ultimately adopted by the House, stated in an analysis of his bill introduced that day, that the proposed change in Section 8(b)(4) was intended to overrule Rice Milling by making illegal the inducements of employees *one at a time* to engage in secondary boycotts.[11] He stated, 105 Daily Cong. Rec. 13091, 13092, July 27, 1959; II Leg. Hist. L.M.R. & D.A. 1522, 1523:[12]

> "Subsection (a) of this substitute is a revision of Section 8(b)(4) of the Taft-Hartley Act, which makes certain types of boycotts and jurisdictional strikes unfair labor practices. It is clear from the legislative history of the Taft-Hartley Act that Congress meant to outl . . all secondary boycotts. Unfortunately, various judicial and administrative decisions have held that the present language of section 8(b)(4) and Section 303 permit labor organizations to engage in some types of secondary boycotts with complete impunity. This has been one of the major weapons, as numerous hearings have disclosed, used by gangsters and racketeers who have infiltrated the labor movement.
>
> "Present law provides that it is unlawful for a union to induce or encourage 'employees of any

[11] This proposal, which was enacted into law, changed the statutory language "to engage in, or to induce or encourage the *employees* of any employer to engage in, a strike or a *concerted refusal*," so that it read, "to engage in, or to induce or encourage any *individual* employed by any person . . . to engage in, a strike or a *refusal* . . ." (Emphasis added).

[12] "Leg. Hist. L.M.R. & D.A." refers to the two-volume work, "Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

employer' to engage in strike or 'concerted refusal' to do their work for one of the forbidden objects listed in Section 8(b)(4)—such as to force their employer to cease doing business with a "primary" employer. Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person'. This change appears in clause 4(i).

"As the present act forbids inducing 'employees' to engage in a strike or 'concerted' refusal to do their work, the courts have held that unions may induce employees one at a time to engage in secondary boycotts.[2] *By changing 'employees' to 'any individual' and omitting the word 'concerted', the proposed revision of clause 4(i) closes this loophole.*" [Italics supplied].

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[2] "N.L.R.B. v. International Rice Milling Co., 341 U.S. 665."

After the passage of the respective labor bills by both the House and Senate, but before the meeting of the conferees, two opponents of the Landrum-Griffin bill, Representative Thompson and Senator Kennedy, made particular reference to the impact of the House bill upon the *Rice Milling* decision. Expressing their understanding that *Rice Milling* protected only the inducement of single individuals, they maintained that if the proscription of the inducement of "concerted" activities were eliminated from the statute, the picketing activities in *Rice Milling* would constitute an unfair labor practice. On behalf of Senator Kennedy and himself, Representative Thompson stated, 105 Daily

Cong. Rec. 15221, August 20, 1959; II Leg. Hist. L.M.R. & D.A. 1707:

> "During the House debate it was asserted that section 8(b)(4) in its present form can be evaded by asking the employees of a secondary employer one at a time to refuse to handle the goods of the primary employer. This appears to be an inadvertent misstatement. When a number of employees refuse to handle goods at the same time each knowing that others will also refuse, there is a 'concerted refusal' within the legal definition of a conspiracy. And if the union induces 'the employees * * * to engage in * * * a concerted refusal,' it makes no difference whether the inducement is addressed to them simultaneously or consecutively.
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> • • • • • • • • • •
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> "The most serious objection to the so-called secondary boycott and hot cargo sections of the House bill is the effect which they may have upon primary picketing. An adequate explanation requires retracing our steps to the distinction between primary and secondary activity. . . .
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> • • • • • • • • • •
>
> "Now suppose that the Carpenters Union puts a picket line around the factory which has the effect of turning back the drivers of independent trucking concerns. This kind of picketing has never been treated as a secondary boycott. It occurs at the factory of the employer primarily engaged in the labor dispute. It aims at halting commercial intercourse with him (a primary boycott), not at halting intercourse with persons who have intercourse with him (a secondary boycott). But if one follows through the literal words of the statute just quoted, it will be seen that a strong verbal argument can be made that the picketing at the factory violates section 8(b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where

an object is to compel the trucking firm not to do business with the door manufacturer during the strike.

"This problem was presented to the Supreme Court in *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 655. The Court held that picketing at the factory did not violate section 8(b)(4)(A) because the "applicable proscriptions of 8(b)(4) are expressly limited to the inducement or encouragement of concerted conduct by the employees of the neutral employer" and "there is no suggestion that the union sought concerted conduct." *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 671.

"The House bill proposes to take out of section 8(b)(4) any references to 'concerted' conduct or to two or more employees and to make it unfair to induce a single person not to perform services, thus overturning the reason for the Supreme Court decision. If this were done, the pickets who appealed to a truckdriver not to enter the plant where men were striking for higher wages could be held guilty of an unfair labor practice."

It is worth noting that the Congressional view is in accord with that expressed by the Sixth Circuit in *Deena Artware*. Indeed, inasmuch as *Rice Milling* was concerned with the pressure exerted by the pickets on the driver of a single truck (the driver's passenger obviously bearing no responsibility in his own right), this Court's holding can have no other meaning.

(c) The Footnote Reference To the Ryan Case Is Obviously Not An Adoption of the Ryan Doctrine.

In its brief Petitioner, after noting quite correctly (Br. 21, 50) that the Board's disposition of the instant case is inconsistent with its earlier espousal of *United Electrical & Machine Workers (Ryan Construction*

Corporation), 85 NLRB 417, proceeds to advance the farfetched notion that this Court has actually approved the Board's holding in *Ryan* (p. 21). Its reference is to a footnote in the *Rice Milling* case, 341 U.S. 672, n. 6, where the *Ryan* citation, one of a string of citations preceded by the notation, "See also," is listed as authority for the proposition set forth in the text of the decision, "That Congress did not seek, by § 8(b)(4), to interfere with the ordinary strike has been indicated recently by this Court." This inconspicuous allusion to a dictum in *Ryan*, which merely expressed a non-controversial view, scarcely constitutes affirmance of the Board's basic holding therein.

The Board itself has acknowledged the limited import of its agreement with the Ryan reference. In *Retail Fruit & Vegetable Clerks' Union, Local 1017 (Crystal Palace Market)*, 116 NLRB 856, 859-860, the Board stated:

> "While the Supreme Court in *International Rice Milling Co., Inc., et al.* v. *N.L.R.B.*, 341 U.S. 665, 672, cited the *Ryan* case, such citation was merely in support of a dictum by the Court that Section 8(b)(4)(A) was not meant to 'interfere with the ordinary strike,' which general statement also appears in somewhat different terms in the Board's opinion in the Ryan case. It does not necessarily follow that, by such citation, the Supreme Court meant to indicate agreement with the Board's specific holding in Ryan that, where the picketed premises are owned by the primary employer, the picketing cannot for that reason be secondary action, even though such premises are used only by employees of secondary employers. Indeed, the Supreme Court expressly stated that the fact that the inducement of neutral employees in the Rice Milling case occurred at the premises of the primary employer was not necessarily controlling in

evaluating the legality of such inducement unde Section 8(b)(4)(A). In any event, the validit of the specific holding of the Board in *Ryan* wa not in issue in the *Rice Milling* case. We do no believe, therefore, that the reference in that cas to *Ryan*, whatever its significance, precludes ou reversal of *Ryan*.

II. THE 1959 AMENDMENTS TO THE ACT, IF ANYTHING RE... THE BROAD NOTION OF SITUS IMMUNITY ADVANCED B... PETITIONER.

A. Viewed In the Light Most Favorable to Petitioner, the Amendments Merely Beg the Question of What Constitutes Legitimate Primary Activity.

Petitioner has relied upon a statement in the House Conference Report that the Amendments were not intended to "overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute"[13] as a springboard for its comment that "While again use of the word 'secondary' was avoided, the proviso confirms that now, as from the beginning, the prohibitory language must be read as applicable only to secondary strike action and its inducement" (Br. 46). Petitioner reads far too much into the Conference Report, for in the light most advantageous to the union the quoted language does no more than to recognize the validity of Board and court decisions which antedate the issuance of the Report.

Apart from the question whether the effect of the Committee's language is to place additional limitations

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[13] H. Rep. No. 1147, 86th Cong. 1st Sess., p. 38, I Leg. Hist. L.M.R. & D.A. 942.

Petitioner conveniently ignored the next sentence of the Conference Report, that "this provision does not eliminate, restrict or modify the limitations on picketing at the site of a primary labor dispute that are in existing law."

upon the primary situs doctrine it is crystal clear that reference to the House Report's concern with primary strikes and primary picketing at best begs the question of whether the instant picketing is illegal. Although the Report lends color to the argument that an observable distinction between primary and secondary picketing has been created by judicial and administrative interpretation, it does not spell out the line of demarcation betwen the two and indeed sets forth no definitional criteria in the least helpful to Petitioner.

B. Proper Analysis of the Conference Report, However, Reveals That It Recognizes Sharp Restrictions Upon Situs Picketing As Declaratory of Existing Law.

Contrary to what Petitioner would have us believe, viz., that the Conference Report's observance of the distinction between primary and secondary picketing confirmed or ratified the legality of the picketing in the instant case (Br. p. 73), the cases cited in the report indicate legislative disapproval of the picketing in issue here. While we recognize, of course, that the 1959 Amendments, passed after the occurrence of the events herein, have no direct bearing upon the resolution of the question of legality, they nonetheless are helpful as a reflection of Congressional understanding of the law then applicable.

The pertinent portion of the text of the House Conference Report, including the four cases cited in support of its declaration, is set forth in our summary of argument (p. 17). Although Petitioner contends that the statement accorded approval to the broad primary situs theory, in actuality the cases cited as support for the statement are illustrative of *restrictions* placed by the Board and courts upon situs picketing, i.e., that the four cases in effect corroborated the immediately pre-

ceding sentence rather than the section as a whole. In *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, the Supreme Court affirmed the Board's proscription of union picketing at a general construction site designed to force the general contractor to terminate the subcontract of a contractor with which it had a dispute. In the *Pittsburgh Plate Glass* case, 110 NLRB 455, the Board relying on *Moore Drydock,* held that a picketing union had violated 8(b)(4)(A) by directing its efforts to the employees of neutral employers working at the job situs through its failure to disclose by appropriate picket signs its dispute with the primary employer alone. The *Washington Coca Cola* case, 107 NLRB 299, prohibited the expansion of picketing activities from the trucks which supplied Coca Cola to retail stores to entrances of the stores used by employees of other employers.

The remaining cited case, *Moore Drydock,* set forth specific criteria under which picketing at a common situs, presumably illegal otherwise, is considered legitimate. This opinion has traditionally (and correctly) been construed as a limitation upon a broad conception of a primary activity. With this in mind, the inclusion of this decision and the omission of certain others from the Conference Report assumes significance. Had the Committee wished to ratify the extreme view of primary activity, it had only to cite such early Board cases as *Ryan, Schultz Refrigerating,* 87 NLRB 502, or *Pure Oil Company,* 84 NLRB 315.

Moreover, the conferees were well aware of the inroads made upon such dubious precedents by more rational later interpretations of the Board. The *Crystal Palace* decision, *supra,* which foreshadowed the ultimate rejection of the *Ryan* doctrine, was given wide

publicity at the time of its issuance in the autumn of 1956. It was featured in the weekly Labor Relations Reporter, published by the Bureau of National Affairs, Inc., on September 3, 1956. Indeed, the Board's decision in the instant case was handed down more than two months before the execution of the Report, and even before the Congressional debates concerning the Landrum-Griffin bill. This decision appeared in the Labor Relations Reporter of June 22, 1959, at the same time that the Reporter noted in its lead article that the House Labor Committee was drafting legislation based upon the Kennedy bill. It is impossible to reconcile these happenings with the assumption of *Amici* that the legislators were unaware of these developments or with Petitioner's contention that the Conference managers disapproved the so-called "new approach" to situs picketing.[14]

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[14] The failure of Congress to do anything about the separate gate cases, which occurred before the passage of the amendments to the Act, indicates Congressional acquiescence in the rule of decision. This general understanding was manifested by the comments of certain legislators the following year when the House dealt with the "situs picketing" bill. This bill, H.R. 9070, was reported out of the House Committee on Education and Labor in April, 1960 and was intended to amend Section 8(b)(4) by legitimizing certain picketing at construction sites. Representatives Frelinghuysen and Goodell, who voted to report the bill, made clear their understanding that it would not overturn the Board and Circuit Court decision in the instant case. In their published supplemental views to the report, after noting that "we feel it advisable to submit these supplemental views to emphasize what this bill does do and what it *does not do*" (original emphasis), they went on to say:

> "The bill strikes precisely at the inequities at which it is aimed. It is limited to employers 'who are in the construction industry'. Thus, it is clear that the employees of an industrial plant which is undergoing new construction or repair

C. In Any Event, the Moore Drydock Limitations Prohibit Picketing At the Reserved Gate.

Neither the Petitioner (Br. 54, 56-57) nor the *amici curiae* (Br. 24-27) seem to quarrel with the propriety of the criteria laid down by the Board in *Moore Drydock Company,* 92 NLRB 547, to restrict picketing activities at a common situs, i.e., a premises shared by two or more employers. Indeed they cannot, in view of the Conference Report's confirmation of *Moore Drydock* as declaratory of existing law. Their disagreement seems to lie with any application of its standards to the instant case on the theory that the General Electric premises were not a "common situs."

The *Moore Drydock* decision represents an attempt of the Board to extricate neutral employers, necessarily enmeshed to some degree in a primary dispute because they share premises with a struck employer, from the impact of a picket line established against the primary employer. To this end, the Board stated four conditions which must be met in order to legitimize picketing activities at common premises, viz:

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would not be permitted by this bill to engage in activities which would induce employees of contractors or subcontractors engaged in such construction or repair to strike. The so-called 'separate gate' cases (*General Electric Corp.*, 123 NLRB 180; *I.U.E.-AFL-CIO* v. *N.L.R.B.*, U.S. Court of Appeals for D.C., 15205, Apr. 18, 1960) are not affected by this proposal. The reverse situation would also be outside of the exception provided by the bill. Employees of the independent construction contractors and subcontractors would not be free under the proposal to picket separate gates established for production employees. Generally speaking, the industrial plant would not be an 'employer in the construction industry' within the meaning of the bill."

House Report No. 1556, Part 2, 86th Cong., 2d Sess., Supplemental Views, p. 20.

"(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer." (92 NLRB at 549.)

1. The picketing falls far short of Moore Drydock's minimal safeguards.

Member Fanning, in his special concurrence in the Board decision now under review, held that Petitioner had violated two of the *Moore Drydock* standards in that the picketing at Gate 3-A "was not reasonably close to the *situs* of the labor dispute with General Electric and that picketing at this Gate did not clearly disclose that the dispute was only with General Electric and had not been extended to the neutral employers of the employees using that Gate" (R. 46). Both conclusions, we submit, were soundly based.

To be sure, the placards carried by the pickets at Gate 3-A declared "Local 761, On Strike, GE Unfair," in nominal compliance with the *Moore Drydock* condition that "the picketing disclose clearly that the dispute is with the primary employer." But the implication of the placards was belied by the actions of the union officers and the pickets themselves, who gave the impression the dispute was one involving the neutral contractors as well. Thus, when a construction worker arriving at Gate 3-A inquired about the picket line, he was informed by a picket patrolling there that construction men were not going in (R. 85). Moreover, when a group of construction workers approached Gate 3-A and asked the pickets stationed there if they

could enter, they were categorically told to "Go home" (R. 105, 106). Other contractor employees, displaying their stickers showing they were employed by contractors, were nonetheless turned away at Gate 3-A (R. 85, 105, 109). That strike activities were aimed at the employees of independent contractors was made clear by the statements of Petitioner's officers who, in response to a contractor's request for the union's permission to allow his employees to enter Gate 3-A, told him that "you can appreciate that we have a picket line up over there" (R. 92) and refused to grant permission (R. 93-95). In the face of these utterances, the placard reference, "GE Unfair," fades to insignificance.

The Petitioner was even more remiss with respect to the criterion that "the picketing is limited to places reasonably close to the location of the situs." This limitation was met by the Union in *Moore Drydock* when it picketed at the gate to the shipyard after permission was denied it to picket at the pier where the picketed ship was located. There, it was found that the pickets were stationed "as close to the *Phopho* as they could get under the circumstances," 92 NLRB at 550. The validity of the *Moore Drydock* safeguard is clear. When access is available to the locus of the dispute the picketing should be confined to that area. Evidence that a union is making no attempt to insulate the neutral employer from a dispute not his own should fairly create an inference that its object was not "primary."

Here Gate 3-A, situated some 200 yards from Gate 3 used by General Electric's employees (R. 16), was surely not reasonably close to the situs of the dispute for access to the employees directly involved was available to, and used by, the pickets. Nor can the patrolling of Gate 3-A be dismissed as an accidental spilling over of picketing activities at the primary situs, since

the distance between gates was too great to permit such a happenstance. In any event the record is clear that the picketing of Gate 3-A was deliberate.

2. The union's attempted distinction between manufacturing cases and other common situs bases is baseless.

Both the Petitioner and the *amici curiae* contend that the fact that services are performed by the aggrieved employer for the struck employer legitimates picketing avowedly aimed at the neutral. Petitioner states (Br. 53-54):

> "But employees of the neutral employer may be called upon to perform work or services involving the primary employer while he is on the premises. To the extent that the business transactions which take place there entail the performance of such work or services, the neutral employees are subjects of lawful inducement to refrain from performing them."

But this, as Petitioner was compelled to admit (Br. 3), is precisely the setting of the *Moore Drydock* case, which gave rise to the limitations upon picketing. There, the struck employer was the owner of a vessel, the *S. S. Phopho*, which was tied up at Moore's pier, and that Moore's employees could perform repair and overhaul on it. Clearly if the union in that case had run afoul of any of the four standards, e.g., if it had been granted permission to picket at the pier and nonetheless chose to picket where it did, an unfair labor practice charge would have merit irrespective of the fact that the innocent neutral performed services for the struck employer.[15] Indeed, contrary to Petitioner's

[15] Perhaps recognizing this pitfall, the brief of *amici curiae* asserts (p. 26) that "the present case would be analogous to *Moore Drydock* if it had been the employees of the contractors, rather

"new approach" to the *Moore Drydock* case, the Board itself in an exposition of the principles underlying *Moore Drydock*, emphasized the intent to confine boycott activities to employees of the primary employer alone. In the *Crystal Palace* case, which as we have noted, was presumably known to Congress at the time of the House Conference Report, the Board stated, 116 NLRB at 858:

> "In developing and applying these standards, the controlling consideration has been to require that the picketing be so conducted as ***to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees***" (Original emphasis).

Petitioner's distinction of *Retail Fruit and Vegetable Clerks Union* v. *N.L.R.B.*, 249 F.2d 591 (CA 9) enf'g *Retail Fruit and Vegetable Clerks Union (Crystal Palace Market)*, 116 NLRB 856, is equally threadbare. Petitioner maintains, contrary to fact, that the picketed neutrals, lessee-concessionaires who operated market stalls in a supermarket owned by the struck employer, Long, were not performing services for him. But not only did Long receive rent from these lessee-concessionnaires, but the amount of rent was calculated upon a percentage of the tenants' receipts over a fixed minimum. Obviously the disruption of their business had as much impact upon Long as the curtailment of the contractors' operations had upon General Electric. Moreover, insofar as customers were no doubt induced to patronize the supermarket because of items sold by

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than the employees of General Electric, who had been on strike". But this of course is a misconception of the facts of the *Moore Drydock* case, for as we have seen, it was the neutral employer who was there performing services for the struck vessel.

the concessionnaires which they wished to purchase, the closing of the leased departments would have an additional adverse effect upon Long in that his own operations in the market would suffer.

Actually there is no valid distinction between this case and *Atomic Products and Production Workers*, 120 NLRB 400, enforced by *per curiam* opinion, sub nom., *Office Employees International Union* v. *N.L.R.B.*, 262 F.2d 931 (CADC). In that case, as in this one, the primary employer's business was conducted in a plant which could be approached through various gates. Just prior to the strike and with warning of it, one gate was set aside for the use of the employees of independent contractors, their employees and materialmen. Despite the restricted use of this gate, however, the striking union placed pickets there as well as at other entrances, thereby dissuading the contractor's employees from entering. The Board viewed this as a breach of Section 8(b)(4)(A) and despite a challenge by the union to the Board's "finding" (id. 932)), the Court found no error and enforced the order.

There, the trial examiner, observing that the picketing occurred at places near the secondary employers businesses, found that such activities "disclose a motivation for the picketing in remote places to be the influencing of employees of secondary employers." Accordingly, he found the picketing to be violative of the Act. Since both the Board and the Court affirmed without discussion, presumably this constituted the basis of their holdings.

It is clear from the words of the Act that a neutral employer does not lose his protection from embroilment in a strike simply because he does business with the

struck employer. Yet, reduced to its essentials, Petitioner's argument would legalize picketing directed against neutrals if they service the struck employer, and make illegal picketing activities directed against persons having no business whatsoever with him. This is obviously absurd, inasmuch as the Act's proscription of activities designed to induce cessation of business with the struck employer surely contemplates a business relationship between the aggrieved and the struck employer.[16]

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[16] Assume, for example, that a union, having a dispute with an insurance company located in an office building also occupied by tenants having no connection with the struck company, placed a picket line at the entrance to the building. Presumably it is this sort of picketing that Petitioner would say is illegal, for none of the office personnel of the other tenants would have a business relation with the insurance company. Yet it would appear that the picket line inducement of the employees of the other tenants (performing no services for the struck company), although deterring them concertedly from entering the premises, would not be violative of Section 8(b)(4) because an object of the activity was not to compel any of their employers to cease doing business with the insurance company.

CONCLUSION

For the reasons set forth above, the judgment below ould be affirmed.

Respectfully submitted,

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bruary 28, 1961

APPENDIX

Excerpt from S. 55, 80th Congress, 1st Sess.; introduced by Mr. Ball (for himself, Mr. Taft and Mr. Smith).

A BILL

"To provide additional facilities for the mediation of labor disputes affecting commerce, to improve the procedures of collective bargaining, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

* * * * * * * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

"SEC. 204. (a) It shall be unlawful to make any contract, or to engage in any combination or conspiracy, in restraint of commerce or impeding the free flow of commerce, if one of the purposes of such contract, combination, or conspiracy is by strikes or threats to strike, or violence or threats of violence, or by concerted refusal of employees in the course of their employment to use, handle, transport, or otherwise deal with or work on specific articles or materials—

"(1) to force or require any employer or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products, as such, of any other producer, processor, or manufacturer; or

"(2) to force or require any employer to recognize, bargain with, or comply with the demands of a labor organization with respect to any employees, or to employ members of a labor organization for any particular employment, if with respect to the employees or the employment in question such employer is not required under the

provisions of the National Labor Relations Act to recognize or bargain with such labor organization.

"Nothing contained in clause (1) of this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

"(b) Whoever violates the provisions of subsection (a) shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

"(c) The district courts of the United States shall have jurisdiction in proceedings instituted by or on behalf of the United States, or by any party suffering loss or damage or threatened with loss or damage by reason of any violation of subsection (a), to prevent and restrain violations of such subsection. It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings to prevent and restrain violations of such subsection.

"(d) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

"(e) The provisions of sections 6 and 20 of the Act

entitled "An Act to supplement existing laws against unlawful, restraints and monopolies, and for other purposes," approved October 15, 1914, and the provisions (except sections 11 and 12) of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932, shall not be applicable in respect of violations of subsection (a), or in respect of any contract, combination, or conspiracy in restraint of commerce, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any material, machines, or equipment."